

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-381

COMMONWEALTH

vs.

POLFILIO SERRANO.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

After a jury trial, the defendant, Polfilio Serrano, was convicted of three counts of indecent assault and battery on a child under fourteen years of age. On appeal, he contends that the judge abused his discretion by permitting the prosecutor to ask certain questions during attorney-conducted voir dire of the venire. We affirm.

Because the victim did not disclose the defendant's sexual assaults to anyone until long after they occurred, the Commonwealth had no physical or forensic evidence to offer the jury to corroborate the victim's testimony. During voir dire, the prosecutor asked each potential juror questions, in several different formulations, designed to determine whether the potential juror was predisposed automatically to acquit the defendant if the Commonwealth had no scientific evidence -- the

so-called "CSI effect." See Commonwealth v. Perez, 460 Mass. 683, 690 (2011); Commonwealth v. Seng, 456 Mass. 490, 503 (2010).

Superior Court Standing Order 1-15 (2015) (standing order), which was in effect at the time of the defendant's trial,<sup>1</sup> expressed general approval of questions "regarding preconceptions or biases relating to . . . the nature of the claims or issues expected to arise in the case" and questions "inquiring about the prospective jurors' willingness and ability to accept and apply pertinent legal principles as instructed . . . ." Standing order 1-15(C)(4)(a)(2) and (3). The standing order generally disapproved of questions "purporting to instruct jurors on the law" or "that tend to indoctrinate or persuade . . . or that encourage the juror to prejudge any issue in the case, to make a commitment to support a particular result . . . ." Standing order 1-15(C)(4)(b)(4) and (5). The scope of questioning permitted during attorney-conducted voir dire is within the trial judge's discretion. See Commonwealth v. Dabney, 478 Mass. 839, 848 (2018). See also G. L. c. 234A, § 67D (2). "This discretion encompasses a judge's ability to prevent posing questions that are likely to confuse, misinform,

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<sup>1</sup> The standing order has been superseded by Rule 6 of the Rules of the Superior Court (2019).

or mislead the jury because of their format or wording."

Dabney, supra at 850-851.

A judge has the discretion to permit juror voir dire questions concerning the CSI effect, although the Supreme Judicial Court has "suggest[ed] that such discretion be exercised with caution," Perez, 460 Mass. at 691 n.13, and has "observe[d] that such questions should be posed sparingly." Commonwealth v. Gray, 465 Mass. 330, 339 (2013). The call for caution is based on three factors. First, the court has expressed skepticism about the existence of the CSI effect, calling the theory "largely speculative." Id. at 338. Second, a tension exists between informing jurors that forensic evidence is not required to prove guilt beyond a reasonable doubt and the rule of Commonwealth v. Bowden, 379 Mass. 472, 485 (1980), that a judge may not remove from the jury's consideration whether the absence of scientific evidence creates reasonable doubt. See Perez, supra. And, third, as a practical matter, "it may prove difficult to frame the question in a way that jurors can fully comprehend." Id.

In this case, it indeed proved difficult to frame the question in a manner that the jurors could understand, without removing the issue from the juror's consideration, and without running afoul of the guidelines of the standing order. That said, over the course of two days of voir dire, the judge

carefully supervised the attorneys' questions to ensure that they stayed within proper boundaries. The judge did not excuse any jurors for cause based on their answers to the prosecutor's CSI questions. The Commonwealth did exercise some peremptory challenges seemingly based on the jurors' answers to those questions -- as did the defendant. In short, we discern no abuse of discretion. "The questions were tailored to ensure that seated jurors were capable of deciding the case without bias and based on the evidence. The questions did not suggest to potential jurors that a lack of scientific evidence could not be considered in determining whether a reasonable doubt existed as to the defendant's guilt." Id.

On occasion, the prosecutor asked if a potential juror would require scientific evidence after hearing a witness testify about a sexual assault, even if the potential juror "believed that witness beyond a reasonable doubt."<sup>2</sup> The defendant contends that these questions misstated or lessened the Commonwealth's burden of proof and asked the jurors to

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<sup>2</sup> For example, when juror 46 at first expressed uncertainty about whether he would require "some physical evidence or biological evidence in addition to testimony of witnesses in order to be satisfied that the Commonwealth has met its burden of proof beyond a reasonable doubt," the prosecutor asked this follow-up question: "But the question really is if you heard testimony from a witness about a sexual assault, and you believed that witness beyond a reasonable doubt, would you still require something else, some physical evidence, biological evidence, in order to be satisfied that the Commonwealth has met its burden?"

commit to a conviction based on the Commonwealth's evidence. Indeed, on the second day of trial, the judge recognized that this formulation was problematic,<sup>3</sup> and he redirected the prosecutor away from this line of questioning. The judge's attentiveness to this issue exemplifies his conscientious exercise of discretion in overseeing the attorney-conducted voir dire. Reviewing the voir dire as a whole, we conclude that "[t]he questions did not commit the jury to a verdict in advance and, as posed, did not have the effect of identifying and selecting jurors who were predisposed to convicting the defendant based on evidence the Commonwealth would present." Id. See Gray, 465 Mass. at 340.

To the extent the prosecutor's questioning may have confused the jurors regarding the burden of proof, the judge's instructions ensured that they understood the law. In his final charge, on the fourth day of trial, the judge gave the required instruction on proof beyond a reasonable doubt from Commonwealth v. Russell, 470 Mass. 464, 477-478 (2015). During deliberations

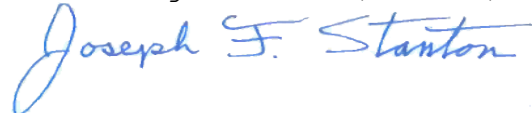
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<sup>3</sup> The judge observed, "I don't know that they're required to believe a witness beyond a reasonable doubt. They're just required to -- they can believe some of what a witness says and disbelieve other parts. What they're required to do is accept that the total amount of evidence that you present satisfies them beyond a reasonable doubt." In this regard, the prosecutor's phrasing of this question may have overstated the Commonwealth's burden of proof. The judge added, "So but the real crux of it is, I feel like that question is asking them to commit to a certain outcome and also has a tendency to indoctrinate . . . and that's why I cut you off."

the next day, the jurors asked the judge to "explain reasonable doubt," and the judge repeated the Russell charge. We presume that the jurors followed the instructions that they heard from the judge on the fourth and fifth days of trial, and that these instructions supplanted any erroneous impression the jurors may have received from the prosecutor during voir dire on the first and second trial days. See Commonwealth v. Rosa, 422 Mass. 18, 29 (1996). Moreover, the question itself belies the notion that the jurors were predisposed to convict.

Judgments affirmed.

By the Court (Sullivan,  
Massing & Lemire, JJ.<sup>4</sup>),



Clerk

Entered: July 18, 2019.

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<sup>4</sup> The panelists are listed in order of seniority.